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Case Commentary: Harmonious Construction or Judicial Disobedience of Stare Decisis? *Suraini Kempe & Ors v Kerajaan Malaysia & Ors*

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ABSTRACT

In *Suraini Kempe & Ors v Kerajaan Malaysia & Ors*, the High Court ruled, on a harmonious construction of the relevant constitutional provisions on citizenship and equality before the law, the word 'father' in Article 14(1)(b), read together with section 1(c) of Part II of the Second Schedule of the Federal Constitution includes the mother of the children born out of Malaysia, and therefore declared, among others, that children born out of Malaysia, to mothers who are Malaysian citizens, are entitled to citizenship by operation of law if all the procedures to those followed by the father are adhered to. A harmonious construction is one where two provisions of the Constitution bearing upon the same subject are read together and so interpreted as to give meaning and effect to, and not render, the provision of the Constitution as otiose or nugatory. Curiously, the learned judge avoided referring to a recent Federal Court decision which ruled there was no necessity to adopt any other requirement to construe the constitutional provisions. The decision, albeit by a majority, is binding on the learned judge. This case comment argues that the learned judge disregarded and disobeyed the well-entrenched doctrine of *stare decisis*.

Keywords: Stare decisis; Interpretation; Federal Constitution; Malaysia

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1. Introduction

Stare decisis is Latin for 'to stand by things decided'. It is the name given to the legal doctrine expressed in Latin as *stare decisis et non quieta movere* which literally means 'to stand by the

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decision, and not to disturb the settled matters'. When it is expressed fully, it means when a point or principle of law has oncen been officially decided or settled by the ruling of a competent court in a case in which it was directly involved, it will no longer be considered as open to examination by courts which are bound to follow the decision of the former court. The rule so established will be adopted in all subsequent cases to which it is applicable, without any reconsideration of its correctness in point of law.[1] Simply put, when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from. As Cozens-Hardy MR in *Velasquez Ltd v Inland Revenue Commissioners* put it succinctly:[2]

> But there is one rule by which, of course, we are to abide—that when there has been a decision of this court upon a question of principle, it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law.

In *Dalip Bhagwan Singh v Public Prosecutor*, Peh Swee Chin FCJ said:[3]

> The doctrine of *stare decisis* or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.[4]

Stare decisis operates to secure certainty in the law, which is of the very first importance. If judicial decisions were subject to frequent change, it would introduce an element of uncertainty into the administration of justice from which it would be the public who would suffer 'great inconvenience'.[5]

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1 Henry Campbell Black, 'The Doctrine of Stare Decisis' (1912) 20 The Law Student's Helper 209.

2 *Velasquez Ltd v Inland Revenue Commissioners* [1914] 3 King's Bench Division Law Reports 458, 461.

3 *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 Malayan Law Journal 1, 12.

4 The said exceptions are as decided in *Young v Bristol Aeroplane Co Ltd* [1944] King's Bench Division Law Reports 718. The part of the decision in *Young v Bristol Aeroplane* in regard to the said exceptions to the rule of judicial precedent ought to be accepted part of the common law applicable by virtue of section 3 of the Civil Law Act 1956 (Act). The relevant *ratio decidendi* in *Young v Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane*.

5 *Haskett v Maxey* 19 LRA 379. Cited in Henry Campbell Black (n 1) 209.

2. *Suraini Kempe & Ors v Kerajaan Malaysia & Or*

The case in discussion is *Suraini Kempe & Ors v Kerajaan Malaysia & Ors*, which was heard by the High Court of Malaya.[6]

2.1 The Proceedings

The proceeding before the High Court of Malaya at Kuala Lumpur is an Originating Summons filed by the plaintiffs seeking a declaration for children born out of Malaysia,[7] to mothers who are Malaysian citizens, to be conferred citizenship by operation of law. The first plaintiff was the President of the Association of Family Support & Welfare Selangor & Kuala Lumpur ('Family Frontiers'), an association that, *inter alia*, focuses on the welfare of mothers while the second to seventh plaintiffs were Malaysian citizen mothers, whose children were born out of Malaysia. The Government of Malaysia, the Minister of Home Affairs and the Director General of the National Registration Department were named as defendants. The plaintiffs submitted that: (i) Article 14(1)(b), read together with the Second Schedule in section 1(c) of Part II of the Federal Constitution ('impugned provision'), is discriminatory towards mothers who are Malaysian citizens whose children are born out of the country; (ii) the impugned provision only confers citizenship to children born out of the country to fathers who are Malaysian citizens; and (iii) the impugned provision ought to be read harmoniously with Article 8 of the Federal Constitution, which guarantees the fundamental rights of equality to all persons before the law.

Article 14 provides as follow:

> 14. (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) every person born before Malaysia Day[8] who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

Section 1 of Part II of the Second Schedule reads as follow:

> 1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

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[6] *Suraini Kempe & Ors v Kerajaan Malaysia & Ors* [2021] Malayan Law Journal Unreported 1864.

[7] Malaysia here is the Federation of 13 States (Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Terengganu) and Federal Territories (Kuala Lumpur, Putrajaya and Labuan).

[8] 'Malaysia Day' means the 16 September 1963: Interpretation and General Clauses Enactment 1963, s 3; Courts of Judicature Act 1964, s 3.

(a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation; and

(b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and

(c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government.

In their respective affidavits, the plaintiffs submitted that among the grievances that they faced were: (i) having to go through a lengthy citizenship application process only to be rejected in the end with no reasons proffered; (ii) difficulties in enrolling the children in school and increased medical expenses; (iii) the fear of losing custody of the children following separation with a foreign national husband; and (iv) constant detainment and questioning about the difference in citizenship between the mother and the children. In reply, the defendants argued that, *inter alia*: (i) the plaintiffs had neither *locus* nor any legitimate expectation for the citizenship of their children as the persons aggrieved were the children and not the mothers. Therefore, the mothers could only bring a representative action on behalf of the children; (ii) the court had no jurisdiction to hear the matter. The power to grant citizenship belongs to the Federal Government as the granting of citizenship is a policy matter. Furthermore, the Federal Government had ousted the powers of the court in determining citizenship issues by express provision in the Federal Constitution; and (iii) the issues were non-justiciable.

2.2 The Issues

The learned High Court judge, Akhtar Tahir J narrowed down the main issues to be as follow:

(i) the *locus standi* of the plaintiffs;

(ii) the jurisdiction of the court and the justiciability of the issues;

(iii) the proper application of the impugned provision.

2.3 The Ground of Judgment

On *locus standi* of the plaintiffs, the learned judge was of the view that the proper principles to determine *locus* is that the issues to be determined by the court should not be abstract, hypothetical or academic and the person bringing the action must have an interest in the

determination of the issues. Reference was made to three higher court decisions—that of two Federal Court decisions and one Court of Appeal decision. All three decisions bind the High Court.

The Court of Appeal decision is in *Dato' Raja Ideris Raja Ahmad & Ors v Teng Chang Khim & Ors*[9] where the Court ruled that the substantive law that conferred jurisdiction on the courts to grant a declaratory judgment was to be found in section 41 of the Specific Relief Act 1950 ('SRA'),[10] supplemented by the procedural law contained in Order 15 rule 16 of the then Rules of High Court 1980 ('RHC').[11] By virtue of section 41 of the SRA and Order 15 rule 16 of the RHC, the court's jurisdiction to make a declaratory judgment was unlimited, subject only to its own discretion. Thus, the court had the power to grant a declaration irrespective of whether the application had a cause of action or not and even if a cause of action did not exist at the time of the filing of an application. The first of the two Federal Court decisions—both on *locus standi*—is in *Tan Sri Hj Othman Saat v Mohamed Ismail*[12] where the Court—speaking through Abdoolcader J (as he then was) who delivered the judgment—ruled that although it was not necessary for a plaintiff who sought relief by way of declaratory judgment to show that he had a present cause of action, he must be somebody with such an interest in the subject-matter of the action as to justify his seeking relief. In that case, the respondent had instituted the proceedings in the High Court seeking declarations impugning the validity of the alienation of land in Mersing to the appellant, who was at all material times the Menteri Besar of the State of Johor, and named the appellant, the State Director of Lands and Mines and the Government of the State of Johor in the proceedings. The appellant applied to have the proceedings struck out primarily for the lack of the respondent's standing to sue. The appellant's application was dismissed by the High Court and the appeal *a quo* before the Federal Court was only on the issue of the respondent's *locus standi*. Based on the authorities on *locus standi*, including the *locus classicus*, namely *Boyce v Paddington Borough Council*,[13] it appeared to His Lordship that 'the plaintiff in proceedings for a declaration need do no more than establish that he has a "real interest" in the suit'.[14] On the facts, the respondent was clearly a person having a special or substantial interest in the subject-matter of the proceedings he had instituted and whose legal interests were particularly affected. This clearly gave him capacity to sue and there could be no justification in debarring him from doing so.

The second Federal Court decision is very much recent, the case being *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor*,[15] which decision was dated 6 August 2021. In this case, questions were posed to the Federal Court by way of special case for determination on the

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[9] *Dato' Raja Ideris Bin Raja Ahmad & Ors v Teng Chang Khim & Ors* [2012] 5 Malayan Law Journal 490.

[10] Act 137.

[11] PU(A) 50/1980. Repealed by Rules of Court 2012, PU(A) 205/2012.

[12] *Tan Sri Hj Othman Saat v Mohamed Ismail* [1982] 2 Malayan Law Journal 177.

[13] *Boyce v Paddington Borough Council* [1903] 1 Chancery Division Law Reports 109.

[14] *Tan Sri Hj Othman Saat* (n 11) 178.

[15] *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor* [2021] 6 Malayan Law Journal 68.

constitutionality of, *inter alia*, the National Security Council Act 2016 ('NSCA').[16] The original panel of the Court declined to answer the constitutional questions on the ground that they were abstract, academic and purely hypothetical. A second panel allowed the appellant's application for review pursuant to rule 137 of the Rules of the Federal Court 1995[17] and set aside the original panel's decision. Hence, the rehearing of the special case. The review application by the appellant, which was allowed by the Court, was based on the appellant's contention that there was a breach of natural justice as the appellant had no notice and was not accorded the opportunity to submit on the issue of whether the constitutional questions were abstract, academic and hypothetical before the decision was pronounced. The issue was never raised by the respondent in either its written or oral submissions; neither did the original panel put the issue to the parties at the hearing of the special case. This, according to the appellant, had resulted in a breach of natural justice which had also occasioned a grave injustice against him, warranting a review intervention by the second panel. After hearing arguments, the Court was persuaded that a case of breach of natural justice had been made out and that the appellant would be left without any remedy if the review was not allowed. The Court found that whether the constitutional questions were abstract, academic and hypothetical merited at least full and serious arguments with the benefit of submissions by both parties. Regrettably, the issue was abandoned and so whether the constitutional questions were abstract, academic and hypothetical remained unaddressed. Be that as it may, Zaleha Yusof FCJ, who delivered the majority decision,[18] found the questions posed were in fact abstract and hypothetical and academic, and must not be entertained under the special case route. Her Ladyship said:[19]

> While the appellant may have *locus standi* to pitch his grievance and approach the court for redress, he must nevertheless establish how he is affected for otherwise the courts will be answering questions in vacuo and rendering a decision which may cause injustice to future cases at the rehearing of this special case.

Based on the above authorities, Ahktar Tahir J found the grievances faced by the plaintiffs were real and not imaginary and further, their grievances had not been disputed by the defendants. The plaintiffs also had a direct interest in the determination of the issues. Whether the plaintiffs could succeed in their action was not a criteria to determine whether they had a *locus* or not. Accordingly, the learned judge ruled that all the plaintiffs had *locus standi*.

On the court's jurisdiction and justiciability, the learned judge identified the crux of the defendants' argument against the court hearing the matter as founded on the doctrine of separation of powers. The defendants argued that the power to grant citizenship belongs to

[16] Act 776.

[17] PU(A) 376/1995.

[18] The majority was 6:1. The judges in the majority were Zaleha Yusof, Zabariah Yusof, Hasnah Hashim, Mary Lim, Harmindar Singh And Rhodzariah Bujang FCJJ. Vernon Ong FCJ dissented.

[19] *Datuk Seri Anwar Ibrahim* (n 15) 118.

the Federal Government as the granting of citizenship is a policy matter. The defendants further contended that the court's power in determining citizenship issues had been ousted, *inter alia*, by section 2 of Part III of the Second Schedule of the Federal Constitution. This provision reads as follow:

> 1. The functions of the Federal Government under Part III of this Constitution shall be exercised by such Minister of that Government as the Yang di-Pertuan Agong may from time to time direct, and references in this Schedule to the Minister shall be construed accordingly.
>
> 2. A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court.

Akhtar Tahir J, however, was not persuaded by the arguments. According to the learned judge, the ouster clause only applied to an application of citizenship to the Minister, for example, under Article 15 of the Federal Constitution, in which case the Minister had a power whether to grant or reject the application. This exercise of discretion by the Minister was rightly not subject to be reviewed by court. The granting of citizenship by operation of law, however, falls under Article 14 of the Federal Constitution, under which the citizenship is given as of right and not subject to the discretion of the Minister.

In his decision, the learned judge alluded to extensive arguments by counsels of both parties on interpretation of the impugned provision. Two main arguments were advanced by the defendants. First, the defendants argued that the court should adopt the literal and pedantic interpretation and give effect to the clear and unambiguous wordings of the impugned provision. Second, the defendants argued that the impugned provision was not discriminatory and did not violate Article 8 of the Federal Constitution. The Article reads as follow:

> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

On the first argument, Akhtar Tahir J was of the view that a literal and pedantic interpretation should not be adopted in interpreting the Federal Constitution being the supreme law of the land. Reference was made to the Federal Court decision in *Alma Nudo Atenza v. PP & Another Appeal* where Richard Malanjum CJ, who delivered the judgment of the Court, said:[20]

[20] *Alma Nudo Atenza v PP And Another Appeal* [2019] 4 Malayan Law Journal 1, 25.

> It is well-established that "a constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles". It is not to be interpreted in a vacuum without regard to the thinking in other countries sharing similar values. The importance of the underlying values of a constitution was noted by the Judicial Committee of the Privy Council in *Matadeen v. Pointu* [1998] UKPC 9 with these words:
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> ... constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account.

On the second argument, the learned judge ruled that all provisions of the Federal Constitution are to be interpreted harmoniously and purposively so as not to render any provision of the Federal Constitution as otiose or nugatory. In short, all provisions of the Federal Constitution should be interpreted in accordance with each other and in fact must be reflective of each other. In support of his ruling, the learned judge referred to the case of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*[21] where the Federal Court was called upon to state the principle of considering the constitution as a whole in determining the true purport and import of a particular provision. Augustine Paul JCA (as he then was), in delivering the judgment of the Court, said:[22]

> A study of two or more provisions of a Constitution together in order to arrive at the true meaning of each one of them is an established rule of constitutional construction. In this regard, it is pertinent to refer to Bindra's *Interpretation of Statutes* (7th Ed) which says at pp 947–948:
>
> The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument (*Old Wayne etc Association v McDonough* SI L ed 345; *Doconers v Bidwell* 82 (US) 244:45 L ed 1088; *Myers v United States* 272 US 52:71 L ed 60, 180). An elementary rule of construction is that, if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous (*Williams v*

[21] *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd & Anor* [2004] 2 Malayan Law Journal 257.

[22] *Danaharta Urus Sdn Bhd* (n 21) 267.

United States 289 US 553:77 L ed 1372; *Marbury v Madison I Cranch* (US) 137:2 L ed 60; *Myers v United States* 272 US 52:71 L ed 60; *United States v Buffer* 297 U SI: 80 L ed 477).

It follows that it would be improper to interpret one provision of the Constitution in isolation from others (see *S v Ntesang* (1995) 4 BCLR 426) …. It was in that spirit that Suffian LP said in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 at p 72:

In our judgment, in construing Article 4(1) and Article 159, the rule of harmonious construction requires us to give effect to both provisions ….

Thus, if two provisions are in apparent conflict, a construction which will reconcile the conflict must be adopted.

On the rule of harmonious construction, His Lordship said that where two 'provisions of the Constitution bear upon the same subject, they must be read together and be so interpreted as to effectuate the great purpose of the instrument, that is to say, the Federal Constitution. The rule of harmonious construction therefore demands that both the provisions be so construed as to give meaning and effect to them'.[23]

Accordingly, Akhtar Tahir J ruled that Article 14 of the Federal Constitution must reflect the provision of equality before the law and equal protection of the law as provided for under Article 8(1) of the Federal Constitution. The learned judge said:[24]

There is a cogent reason why the impugned provision must be reflective of [Article] 8. The cogent reason being [Article] 8 falls under fundamental liberties. It is to be noted that principles of fundamental liberties are based on universal norms that transcend any law. Even if these universal norms are not adopted formally, all provisions of law must be still subject to these universal norms. Non-compliance with fundamental liberties will lead to anarchy and dissatisfaction amongst members of the society … Any breach to these fundamental liberties should be viewed restrictively.

Again, in support of this ruling, the learned judge referred to another Federal Court decision in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals*.[25] In so doing, the learned judge stayed faithful to the doctrine of *stare decisis*. In that case Zainun Ali Federal ConstitutionJ, in delivering the judgment of the Court, said:[26]

[I]t must be recalled that the provisions of the Constitution are not to be interpreted literally or pedantically …. This is particularly so in respect of

[23] *Danaharta Urus Sdn Bhd* (n 21) 270.

[24] *Suraini* (n 6) 1871.

[25] *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 1 Malayan Law Journal 545.

[26] *Indira Gandhi Mutho* (n 25) 600–601.

> [Article] 12(4), which falls under the fundamental liberties section in Part II of the Constitution. As was held in *Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301:
>
> The Constitution is a document *sui generis* governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. *On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights*. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. (emphasis added)

While it was accepted that Article 8 of the Federal Constitution 'is not absolute as [Article] 8(2) begins with the phrase "except as expressly authorised by the Constitution", it was the learned judge's view that "the exceptions must be stated expressly as being an exception … For there to be an express exception, the impugned provision should start with a phrase like "notwithstanding [Article] 8"'.[27] Accordingly, the learned judge concluded that the word 'father' in the impugned provision must include the mother of the children born out of Malaysia, and pursuant to which the learned judge declared that 'the word father includes the mother and therefore the children of the second to seventh plaintiffs and all other women who are faced with a similar situation are entitled to citizenship by operation of law if all the procedures similar to those followed by the father are adhered to'.[28]

3. Criticism Against *Suraini*

Malaysia has ratified international treaties and conventions intending to give equal rights without consideration of gender. However, Akhtar Tahir J made it clear in his judgment that it was not about giving effect to these international treaties or conventions that he ruled in favour of the plaintiffs. It was, instead, to give effect to the legitimate expectation of the plaintiffs to have their children the right to citizenship by operation of law. According to the learned judge, the legitimate expectation of the mothers in the case was derived from natural instinct to give the best to their children. The learned judge said:

> It is only natural that a parent desires that everything of value be inherited by their children be it material or otherwise…. In this case, the plaintiffs as mothers, value the Malaysian citizenship and are loyal to the country and this has motivated them to file this OS. Given a choice, this (*sic*) mothers would have avoided the courts at all cost. This is the very criteria the impugned

[27] *Suraini* (n 6) 1871.

[28] *Suraini* (n 6) 1872.

> provision was promulgated to reward loyalty. It could be the word father is used as at that point of time it was difficult to travel and usually it was the fathers who had to travel out of the Federation. Now anyone can travel easily.

The learned judge was of the view that Federal Constitution should be interpreted to meet the needs of current time, the theory of this interpretation being 'the organic theory'.[29] The needs of children whose rejection of citizenship has resulted, among others, in depriving them of the privileges of citizenship, which includes education, healthcare travel apart from mental suffering, has to be addressed by the law. These hardships have been compounded during the pandemic where there is a restriction on travel.[30]

In the upshot the learned judge ruled that on the proper reading (read: harmonious construction) of the impugned provision the word father includes the mother and therefore the children of the second to seventh plaintiffs and all other women who are faced with similar situation are entitled to citizenship by operation of law if all the procedures similar to those followed by the father are adhered to.

Expectedly, Akhtar Tahir J's decision was much applauded when the media reported it. It was celebrated and called 'a landmark decision' and 'momentous', among others.[31] Even the Women, Family and Community Development Minister welcomed the decision.[32] The government was thereafter vehemently urged not to appeal against the ruling.[33] When the defendants filed the notice of appeal, Family Frontiers expressed its deep disappointment.

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[29] NS Bindra speaks of two theories of interpretation of Constitution namely, the mechanical and organic theories. The latter is to be preferred. The organic method requires the courts to see the present social conditions and interpret the Constitution in a manner so as to resolve the present difficulties. *Interpretation of Statutes* (10th ed) 1295.

[30] The hardship could be seen highlighted in the affidavit of the second plaintiff whose child was born in Zambia. Her husband is a Zambian national. Her application for citizenship for her child under Article 15(2) of the Federal Constitution was rejected after 2 years with no reasons given. The Registration Department had also not responded to her application for an identity card even after 3 years. This had caused difficulty for the second plaintiff in enrolling her child to school, increased medical expenses and other severe hardships. The same hardships were also faced by all the other plaintiffs. The third plaintiff had an added difficulty as she was separated from her husband and she feared she would lose custody of her child to the husband who is a foreign national. Meanwhile, the seventh plaintiff whose children were born in Thailand had been constantly detained and questioned about the difference in citizenship between her and her children.

[31] S Indramalar, 'Citizenship rights: One giant step forward for gender-equal laws' *The Star* (9 September 2021) <https://www.thestar.com.my/lifestyle/family/2021/09/09/a-women039s-right-high-court-decision-is-on-giant-step-forward-for-gender-equal-laws>.

[32] Ashley Tang, 'Rina Harun welcomes High Court citizenship decision, says sheds new light on aspirations of women' *The Star* (11 September 2021) <https://www.thestar.com.my/news/nation/2021/09/11/rina-harun-welcomes-high-court-citizenship-decision-says-sheds-new-light-on-aspirations-of-women>.

[33] See Heng Seai Kie, 'Wanita MCA urges govt to heed public opinion to uphold High Court ruling, promote gender equality in Malaysia' *The Star* (13 September 2021) <https://www.thestar.com.my/opinion/letters/2021/09/13/wanita-mca-urges-govt-to-heed-public-opinion-to-uphold-high-court-ruling-promote-gender-equality-in-malaysia>. See also Letter Endorsed By 114 Organisations and 52 Individuals, 'Ending gender bias in conferring citizenship' *The Star* (14 September 2021) <https://www.thestar.com.my/opinion/letters/2021/09/14/ending-gender-bias-in-conferring-citizenship>.

'We are appalled and deeply disappointed by the Government's move to appeal against the High Court decision. We see this move as a betrayal of the rights that are long overdue to Malaysian women,' the NGO said in a statement.[34]

This takes us to the criticism of the learned judge's decision. Had the learned judge stayed faithful to the doctrine of *stare decisis*, he would have considered what he himself referred to as a 'recent decision of the apex court which decided that children born out of illegitimate liaisons are to follow the citizenship of the mother.' Curiously, the case was not even named by the learned judge. It should be the case of *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors*,[35] which decision was dated 28 May 2021,[36] where the issue before the Federal Court was fairly straightforward. It was whether an illegitimate child born outside Malaysia, to a Malaysian biological father and a Filipino mother, is entitled to become a citizen by operation of law pursuant to Article 14 of the Federal Constitution. In this case, the first appellant ('CTEB') was a minor male. The second appellant ('CWB'), a Malaysian citizen, was CTEB's biological father. CTEB's mother was a Filipino citizen when he was born in the Philippines in 2010. At the time of CTEB's birth, his parents were not married, but five months later they legally registered their marriage in Malaysia and since then the three of them—all non-Muslims—made Malaysia their home. In late 2016, the appellants applied for a declaration that CTEB was a Malaysian citizen by operation of law under Article 14(1)(b) of the Federal Constitution. The High Court dismissed the application on the ground that CTEB had not met the criteria stipulated under that provision read together with section 1(b) of Part II of the Second Schedule of the Federal Constitution and section 17 of Part III of that Schedule. On appeal, the Court of Appeal upheld the High Court's decision. On further appeal to the Federal Court, the Court had the occasion to consider, among others, whether section 1(b) was discriminatorily in that legitimate and illegitimate children and their fathers and mothers were treated differently contravening Article 8(1) of the Federal Constitution which declared all persons as equal before the law and entitled to the equal protection of the law. In short, the appeal concerns the harmonious reading of the relevant provisions of the Federal Constitution.

Three judges, including the Chief Justice, Tengku Maimun,[37] ruled in favour of 'a wholesome and harmonious reading of the provisions of the Federal Constitution relating to citizenship'. According to the Chief Justice, only such a reading would not give rise to unlawful discriminations[38] against the 'all-pervading provisions' of Article 8 of the Federal Constitution. A narrow and pedantic reading, on the other hand, would unwittingly

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[34] S Indramalar, 'Justice delayed is justice denied, group says' *The Star* (14 September 2021) <https://www.thestar.com.my/lifestyle/family/2021/09/14/justice-delayed-is-justice-denied-group-says>.

[35] *CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 4 Malayan Law Journal 236.

[36] This was more than 2 months earlier than the case of *Datuk Seri Anwar Ibrahim* (n 15).

[37] The other two judges are Nallini Pathmanathan and Mary Lim FCJJ. All three wrote separate judgments.

[38] Tengku Maimun CJ considered three instances of discrimination, namely discrimination against the parents; discrimination relating to the *jus sanguinis* principle which section 1(b) of Part II partly encapsulates; and discrimination (though not expressly submitted but which must no less be inferred for coherence of the law) against Muslims. See *CTEB* (n 35) 269-270.

promote unlawful discrimination by the Federal Constitution itself, which would be untenable. In the words of Nallini FCJ, since citizenship is a fundamental right under the Federal Constitution, would a construction of the citizenship provisions of the Federal Constitution that condone discriminations be tenable? Is that the intent and purpose of Article 14(1)(b) read together with section 1 Part II of the Second Schedule and section 17 Part III of the Second Schedule of the Federal Constitution? Her Ladyship said:

> [T]he citizenship provisions in the Federal Constitution ought to be construed so as to accord to the people seeking relief, the full benefit of the provisions, rather than reading them down to deny persons or a section of them their basic entitlement to a right to life. As the Federal Constitution is the supreme law it is incorrect to apply pedantic and technical rules and interpretations, which may be necessary in statutory interpretation, when construing the paramount law. This is because the Federal Constitution sets out the framework for government and its objects and the principles of government ought not to be abrogated by the use of meagre and inadequate technical rules or grammar…. [T]he function of a judge is not to adopt a grammarian approach in the construction of statutes, far less the Federal Constitution.

Her Ladyship further said:[39]

> Of importance and particular relevance … is also the rule that each of the fundamental constitutional principles is of equivalent importance and no one provision should be enforced so as to nullify or substantially prejudice or harm the other. As such a construction should be adopted which has the effect of achieving a harmonious interpretation throughout, so as to protect and enforce the overall Constitution. This is a well-established rule (see *Dick v United States* 208 US 340; 52 L Ed 520; *Prigg v Pennsylvania* 16 Pet 539 (US); 10 L Ed 1060) and the construction which achieves harmony should be preferred to an alternative interpretation which would give rise to uncertainty and conflict.

The third judge, Mary Lim FCJ, in concluding her judicial support for a harmonious construction of the Federal Constitution, said:[40]

> The reading, interpretation and application of the Federal Constitution in the manner as conducted by the learned Chief Justice renders art 14 harmonious with the other provisions of the Federal Constitution, in particular arts 5 and 8; that a child of a citizen enjoys no less rights and liberties; and more fundamentally, is equally protected by the law, just as his father or mother is. This effectively gives meaning to the oft-quoted reference to our Federal Constitution as a 'living piece of legislation' — see *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 and serve

[39] *CTEB* (n 35) 297.

[40] *CTEB* (n 35) 310.

> to provide an inclusive yet expansive approach in the construction of our beloved Federal Constitution. Any discrimination even if authorised under the Federal Constitution and unless expressly and clearly authorised must be strictly and narrowly construed, and must never be unwittingly condoned or encouraged.

It appears therefore that Akhtar Tahir J's ruling that all provisions of the Federal Constitution are to be interpreted harmoniously and purposively so as not to render any provision of the Federal Constitution as otiose or nugatory is well grounded on the doctrine of *stare decisis*.[41] However, the three judges above were in the minority. The majority (4 to 3)[42] ruled that the entire Article 14(1)(b) and s 1(b) of Part II of the Second Schedule of the Federal Constitution must be read together with the interpretation provision in the Federal Constitution, in particular, section 17 of Part III in order to determine the qualifications necessary for the acquisition of citizenship by operation of law. There was no necessity to adopt any other requirement to construe the provisions. According to the President of the Court of Appeal, Rohana Yusuf, who delivered the majority judgment of the Court, construing Article 14 of the Federal Constitution 'is not a difficult process'. Her Ladyship said:[43]

> The opening words of [Article] 14 are that it must be read 'subject to the provisions of this Part'. This Part refers to Part III of the Federal Constitution (Citizenship) …. With such clearly worded provisions how then one ignores the application of [section] 17 [of Part III of the Second Schedule of the Federal Constitution] to section 1(b) of Part II of the Second Schedule?
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> [T]his is substantiated by the fact that [section] 17 applies by virtue of [Article] 31 [of the Federal Constitution].[44] Article 31 mandates the application of the supplementary provisions contained in Part III of the Second Schedule to the construction of the citizenship provisions. It is in that Part III that [section] 17 resides.

On the principle of considering the constitution as a whole in determining the true purport and import of a particular provision, Her Ladyship said:[45]

> It needs no emphasis that the relevant provisions relating to the citizenship by operation of law in the Federal Constitution must be read as a whole and to be given a straightforward plain meaning. It is improper to interpret one

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[41] Notwithstanding that *CTEB* (n 35) was not referred to by the learned judge.

[42] Rohana Yusuf PCA, Vernon Ong, Zabariah Yusof, Hasnah Hashim FCJJ.

[43] *CTEB* (n 35) 282.

[44] Article 31 of the Federal Constitution reads: Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part. This Part refers to Part III of the Federal Constitution (Citizenship).

[45] *CTEB* (n 35) 283.

> provision of the Federal Constitution in isolation from the others. Especially so, when the clauses indeed are written to be subjected to the other.
>
> To half read the provision by ignoring that [section] 1 must be read 'Subject to the provisions of Part III' is to deny the clearly express terms of the Federal Constitution. The Federal Constitution must always be considered as a whole so as to give effect to all its provisions (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257).

Lest it be forgotten, the fundamental rule in interpreting the Federal Constitution or any written law is to give effect to the intention of the framers. Her Ladyship accordingly cautioned:[46]

> The court cannot insert or interpret new words into the Federal Constitution. The court may only call in aid of other canons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more than one meaning. I find [section 17] is plain and clear in its meaning. The court should not endeavour to achieve any fanciful meaning against the clear letters of the law.

On the issue of discrimination if the provisions were not given a harmonious construction, Her Ladyship said:[47]

> The protection against discrimination is part of the constitutional guarantee embedded in [Article] 8 of the Federal Constitution …. A student of Constitutional law [however] will appreciate that not all forms of discrimination are protected by [Article] 8. Article 8 opens with 'Except as expressly authorised by this Constitution'. In short, discrimination authorised by the Federal Constitution is not a form of discrimination that [Article] 8 seeks to protect. There are in fact a number of discriminatory provisions expressed in the Federal Constitution which include [Article] 14. Since the discriminatory effect of [Article] 14 is one authorised by the Federal Constitution, it would be absurd and clearly lack of understanding of [Article] 8 for any attempt to apply the doctrine of reasonable classification, to [Article] 14.

It begs the question of whether the judiciary in the exercise of its duty is constitutionally empowered to ignore or neglect the clear dictates of the Federal Constitution and overcome that 'authorised discrimination' in the name of progressive construction of the Federal Constitution. Since the Federal Constitution discriminates—for examples, between a legitimate and an illegitimate child, a father and a mother of an illegitimate child—can the court alter that discrimination so as to keep the Federal Constitution living dynamically in order to avoid it from being locked and fossilised in 1963? In the words of the learned

[46] *CTEB* (n 35).

[47] *CTEB* (n 35) 291.

President, the court cannot at its own fancy attempt to rewrite the clear written text of the Federal Constitution because it would only lead to absurdity.[48]

In conclusion, the majority ruled that there was no necessity to adopt any other requirement to construe the relevant provisions on citizenship other than those expressly stated in the same provisions.

3. Conclusion

The doctrine of *stare decisis* dictates that the courts in the lower tier of the judicial hierarchy accept loyally the decision of the court in the higher tier. The former is obliged generally to follow the decision of the latter. It is called vertical *stare decisis*. The doctrine applies whenever the relevant facts of an earlier case are similar to the facts of a subsequent case—that is, the relevant facts of the two cases are similar. However, if the facts are not similar then the earlier decision would be distinguished and as such would not be binding on the subsequent case.[49]

In *Suraini*, one of the main issues narrowed down by the learned judge himself was the proper application of the impugned provision—Article 14(1)(b), read together with section 1(c) of Part II of the Second Schedule of the Federal Constitution. The plaintiffs contended that the impugned provision is discriminatory and called on the court to interpret the provision to be read harmoniously with Article 8 of the Federal Constitution which guarantees the fundamental rights of equality to all persons before the law. The learned judge obliged and so ruled that all provisions of the Federal Constitution are to be interpreted harmoniously. In particular, the application of the impugned provision must reflect the provision of equality before the law and equal protection of the law as provided for under Article 8(1) of the Federal Constitution. On this ruling, the learned was well within the doctrine of *stare decisis* as the cases of *Danaharta* (2004), *Indira Gandhi Mutho* (2013) and *Alma Nudo* (2019) give credence to the learned judge's considered decision. Even the dissenting decisions of Tengku Maimun CJ, Nallini and Mary Lim FCJJ in *CTEB* would lend support to the principle of harmonious construction. Curiously, the case was not referred to by the learned judge. It could not have been because it was too recent in time when the decision in the case of *Datuk Seri Anwar Ibrahim*, which was referred to by the learned judge on *locus standi*, was dated more than two months after *CTEB*. Even more curious, Akhtar Tahir J did not refer and consider Article 31 of the Federal Constitution for its purport and

[48] *CTEB* (n 35) 293.

[49] In *Chai Kok Choi v Ketua Polis Negara & Ors* [2008] 1 Malayan Law Journal 725 two questions of law were posed for the consideration of the Federal Court. In respect of the first question of law, Ahmad Fairuz CJ, delivering the judgment of the Court, said: 'It is of particular importance to remember the well-established principle that the rule of precedent shall apply whenever the relevant facts of an earlier case are similar to the relevant facts of a subsequent case and if such situation happens the decision of the earlier case shall be binding on the subsequent case. However, such rule would only apply if the relevant facts of both cases are similar. If the relevant facts are not similar then the earlier decision would be distinguished and as such would not be binding on the subsequent case.'

effect. Article 31 expressly provides for the application of the supplementary provisions contained in Part III of the Second Schedule for the purposes of Part III of the Federal Constitution on citizenship. As Rohana PCA pointedly alluded, it is in Part III of the Second Schedule that section 17 resides.

Citizenship by operation of law is not peculiar to Malaysia. Many countries in the world recognise this principle of citizenship, based on its own set of criteria as well as the *jus soli* and *jus sanguinis* rule. Hence, whether one is qualified as a citizen by operation of law naturally must be discerned from the criteria as embedded in the Federal Constitution itself, upon the true construction of the relevant provisions. One either fits the given criteria under the Federal Constitution or one does not. The criteria are clearly stipulated in the Federal Constitution and it does not require any exercise of discretion by the authority. These require the fulfilment of the requisite conditions at the time of birth.[50] In other words, the qualification of citizenship by operation of law must be met at birth and must be conferred as a matter of birthright.[51] It is worth reminding what Raja Azlan Shah FJ (as his Royal Highness then was) said in *Loh Kooi Choon v Government of Malaysia*[52] that the 'ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it'. Thus, the constitutional regime and mechanism for acquisition of citizenship under Part III of the Federal Constitution must be given effect according to the unequivocal words of the Federal Constitution as the supreme law of the land.

The majority decision in *CTEB* binds the High Court in *Suraini*. This is trite law. The learned judge is bound to follow the decision whether he agrees with it or not. With the greatest of respect, the learned judge curious non-reference to *CTEB* is a judicial disregard of the doctrine of *stare decisis*. It does not augur well for judicial discipline when a High Court judge treats the decision of the Federal Court, albeit a majority decision, with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. The judicial disobedience cannot be condoned even in the name of harmonious construction of the supreme law of the land.

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[50] See the judgment of Rohana PCA in *CTEB* (n 35) 284–285.

[51] See the Court of Appeal cases of *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3 Malayan Law Journal 308; *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2018] 6 Malayan Law Journal 548; and *Chan Tai Ern Bermillo (a minor bringing this action through his biological father and next friend, the second plaintiff) & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2020] 3 Malayan Law Journal 634. All of these cases were considered by Rohana PCA who opined that the proper and correct interpretation of section 17 was applied. Her Ladyship also agreed with the approach taken in these cases in the application and construction of Article 14 of the Federal Constitution and the related provisions.

[52] *Loh Kooi Choon v Government of Malaysia* [1977] 2 Malayan Law Journal 187.